SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 526

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE JOHN BARTH COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1 [Caption omitted.]

UNITED STATES OF AMERICA, vs. THE JOHN BARTH COMPANY AND UNITED States Fidelity & Guaranty Company	At law

2 [Praecipe for summons omitted in printing.]
[Summons and marshal's return, filed Sept. 23, 1926, omitted in printing.]

3 In United States District Court, Eastern District of Wisconsin

Bill of Complaint

Filed Sept. 22, 1926

Comes now the plaintiff by its attorney, Roy L. Morse, United States Attorney for the Eastern District of Wisconsin, and for its cause of action against the defendants herein respectfully states and alleges:

I

That at all times hereinafter mentioned the United States of America was and is now a corporation sovereign and body politic.

II

That at all times hereinafter mentioned the John Barth Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business at 459–40th Street, Milwaukee, Wisconsin, and within the jurisdiction of this court.

4 III

That at all times hereinafter mentioned the defendant, the United States Fidelity and Guaranty Company, was and now is a corporation organized under and by virtue of the laws of the State of Maryland, with its post office address and principal place of business at Baltimore, Maryland, and has complied with the laws of the State of Wisconsin in regard to a foreign corporation doing business in such State, and is qualified to do and does business in the State of Wisconsin and within the jurisdiction of this court.

IV

That on or about June 25, 1916, the Commissioner of Internal Revenue duly assessed income and profits tax against the John Barth

Company in the sum of $126,182.81 for the year 1918, of which sum the John Barth Company duly paid $74,764.40.

V

That on or about September 15, 1919, and on March 17, 1925, the John Barth Company duly filed claims for the abatement of income and profits taxes assessed against said company for the year 1918 in the sum of $39,501.58.

VI

That on or about September 20,1919, the John Barth Company as principal and the United States Fidelity and Guaranty Company as surety, in consideration of plaintiff refraining from and suspending the collection of the above-mentioned outstanding taxes assessed against the John Barth Company for the year 1918, pending consideration and adjudication of the aforesaid claims for abatement, executed and delivered on September 20, 1919, to plaintiff a bond in the sum of $60,000, whereby the defendants firmly bound themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally, to pay any part of the tax sought to be abated by the aforesaid claims for abatement. Upon notice and demand by the collector of internal revenue of the amount of tax found by the Commissioner of Internal Revenue to be due upon the determination of said claims, together with interest at the rate of 12 per centum per annum from the time such tax would have been due had no such claim been filed. A copy of said bond is attached hereto and made a part hereof as if herein fully written and marked Exhibit "A" for identification.

VII

That thereafter on or about March 25, 1926, the Commissioner of Internal Revenue considered the said claims for abatement and rejected the same on IT Schedule 4902, in the sum of $29,842.32, of which determination the John Barth Company was notified and payment requested under said bond, demanded, respectively, on or about February 27, 1926, and April 5th and April 20, 1926, but the payment of said tax as shown by said determination, together with interest thereon, has not been made, the John Barth Company having wholly neglected, failed, and refused to pay the same or any part thereof, and still so neglects, fails, and refuses to pay.

VIII

That on or about August 10th and August 27, 1926, the United States Fidelity and Guaranty Company was notified of the determination by the Commissioner of Internal Revenue in rejecting the said claims for abatement in the sum of $29,842.32, and that there

was outstanding against the John Barth Company as a result of the rejection of said claims for abatement, income, and profits tax in the sum of $29,842.32 and interest in the sum of $11,538.12, which was due under the aforementioned bond executed by the United States Fidelity and Guaranty Company as surety, and demand was made upon said dates last mentioned upon the defendant, the United States Fidelity and Guaranty Company for the payment of said taxes and interest so determined to be due, but said United States Fidelity and Guaranty Company has failed, neglected, and refused and still fails, neglects, and refuses to pay said tax and interest, or any part thereof. That the said taxes and interest is still due, outstanding, and unpaid.

6

IX

That pursuant to the provisions of the statute in such cases made and provided, interest on said assessment has accrued at the rate of 1 per centum per month from June, 1919.

X

That the Commissioner of Internal Revenue authorizes and sanctions these proceedings.

XI

By reason of the foregoing and pursuant to the terms and conditions of said bond as set forth in Exhibit "A" attached hereto, defendants, and each of them, are indebted to the plaintiff in the sum of $29,842.32, together with interest thereon at the rate of 1 per centum per month from June, 1919.

Wherefore plaintiff demands judgment against the defendants and each of them for the sum of $29,842.32, together with interest thereon at 1 per centum per month from June, 1919, and the costs herein.

(Signed) R. L. Morse,
United States Attorney,
Attorney for Plaintiff.

Exhibit "A" to bill of complaint

(copy)

Income and profits taxes—Bond under sections 214(a)(12) and 234(a)(14) of the revenue act of 1918

Know all men by these presents that John Barth Company, of Milwaukee, Wisconsin, as principal, and United States Fidelity & Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the United States of America in the sum of sixty thousand and no/100 dollars, lawful money of the United States,

7 for the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas, at the time of filing his return of income for the taxable year 1918 the above-bounden principal has filed or is about to file a claim in abatement based on the fact that he has sustained a substantial loss resulting from a material reduction (not due to temporary fluctuation) of the value of his inventory for such taxable year or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year; and

Whereas, section 214(a)(12) and 234(a)(14) of the revenue act of 1918 provide that in the case of such a claim payment of the amount of the tax covered thereby shall not be required until the claim is decided, but that the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the commissioner, conditioned for the payment of any part of such tax found to be due, with interest, and it appears that the amount of this bond is double that of the tax covered by such claim in abatement;

Now, therefore, the condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector duly pay any part of such tax found by the commissioner to be due, with interest at the rate of twelve per cent per annum from the time such tax would have been due had no such claim been filed, and shall otherwise well and truly perform and observe all the provisions of law and the regulations, then this obligation is to be void, but otherwise to remain in full force and virtue.

Witness our hands and seals this 20th day of September, 1919.

(Signed) JOHN BARTH CO.,
By LOUIS SCHNEIDER, *Pres.*
UNITED STATES FIDELITY & GUARANTY CO.,
By R. K. BARTON, *Agt. Atty. in Fact.*

Signed, sealed, and delivered in the presence of—
JULIUS ZIEGLER,
R. C. MUELLER, JR.

8 [over]

STATE OF WISCONSIN,
Milwaukee County, ss:

On this 20th day of September, 1919, before me, a notary public within and for said county and State, personally appeared R. K. Barton to me personally known, who, being by me duly sworn, upon oath did say that he is the agent and attorney in fact of and for the United States Fidelity & Guaranty Company, a corporation of Baltimore, Maryland, created, organized, and existing under and by virtue of the laws of the State of Maryland, that the corporate seal affixed to the foregoing within instrument is the seal of the said company; that the said seal was affixed and the said instrument was executed by authority of its board of directors, and the said R. K.

Barton did acknowledge that he executed the said instrument as the free act and deed of said company.

[Notary public.] (Signed) CLEMENTINE F. DETTLOFF,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Dec. 3, 1922.

In United States District Court

Demurrer

Filed Oct. 7, 1926

Now, come the defendants, by their attorneys, Lines, Spooner & Quarles, and demur to the complaint of the plaintiff herein for the reason that it appears upon the face of the complaint that the action was not commenced within the time limited by law which time is prescribed by sections 205d of the revenue acts of 1918 and 1921, and sections 277a–2, 278d and 278e of the revenue act of 1924, and sections 277a–3, 278d, 278e, and 1106a of the revenue act of 1926.

LINES, SPOONER & QUARLES,
Attorneys for Defendants.

* * * * * * *

9 In United States District Court

Notice of motion to sustain demurrer

Filed Jan. 4, 1927

To ROY L. MORSE,
U. S. District Attorney for the Eastern District of Wisconsin:

Please take notice that the defendants herein will move the court on the 8th day of January, 1927, or as soon thereafter as counsel can be heard, that the demurrer of the defendants to the complaint of the plaintiff be sustained.

Dated December 23, 1926.

LINES, SPOONER & QUARLES,
Attorneys for Defendants.

* * * * * * *

In United States District Court

Judgment

Filed January 5, 1927

Before Hon. FERDINAND A. GEIGER, Judge

This day came the Assistant United States Attorney Mr. L. H. Bancroft and the defendants with their counsel, Messrs. Lines,

Spooner & Quarles, and the demurrer of the defendants to the complaint came on to be heard and was argued and submitted on consideration whereof, it is ordered that said demurrer be and the same hereby is sustained.

The plaintiff elected to stand on its complaint and it is ordered that judgment be entered dismissing the complaint.

Whereupon it is considered and adjudged by the Court that the plaintiff take nothing by its suit, and that the complaint be and the same hereby is dismissed.

By the court.

(Signed) F. C. WESTPHAL, JR.,
Clerk.

[File indorsement omitted.]

* * * * * * *

10 In United States District Court

Petition for writ of error

Filed Mar. 10, 1927

And now comes the United States of America, a body sovereign and corporate, plaintiff herein, and by its attorney, L. H. Bancroft, Assistant United States Attorney for the Eastern District of Wisconsin, and says that on or about the 5th day of January, 1927, this court entered judgment herein in favor of the defendants and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will appear more in detail upon the assignment of errors which is filed with this petition, and further alleges as follows:

First. That on or about the 28th day of September, 1926, your petitioner brought suit in the United States District Court for the Eastern District of Wisconsin upon its bill of complaint wherein it appears and is alleged that at all times hereinafter mentioned the United States of America was and now is a corporation sovereign and body politic.

Second. That at all times hereinafter mentioned, the John Barth Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, having its principal office and place of business at 459-40th Street, Milwaukee, Wisconsin, and within the jurisdiction of this court.

Third. That at all times hereinafter mentioned the defendant, the United States Fidelity & Guaranty Company, was and now is a corporation organized under and by virtue of the laws of the State of Maryland, having its principal office and place of business at Baltimore, Maryland, and that it has complied with the laws of the State of Wisconsin in regard to a foreign corporation doing

business in such State, and is qualified to do and does business in the State of Wisconsin and within the jurisdiction of this court.

Fourth. That on or about June 25, 1919, the Commissioner of Internal Revenue duly assessed income and profits tax against the John Barth Company in the sum of $126,182.81 for the year 1918, of which sum the John Bath Company duly paid $74,764.40.

11 Fifth. That on or about September 15, 1919, and on March 17, 1925, the John Barth Company duly filed claims for the abatement of income and profits taxes assessed against said company for the year 1918 in the sum of $39,501.58.

Sixth. That on or about September 20, 1919, the John Barth Company as principal, and the United States Fidelity & Guaranty Company as surety, in consideration of plaintiff refraining from and suspending the collection of the above mentioned outstanding taxes assessed against the John Barth Company, pending consideration and adjudication of the claims for abatement, executed and delivered on September 20, 1919, to the plaintiff, a bond in the sum of $60,000 whereby the defendants firmly bound themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally, to pay any part of the tax sought to be abated by the aforesaid claims for abatement upon notice and demand by the Collector of Internal Revenue of the amount of the tax found by the Commissioner of Internal Revenue to be due upon the determination of said claims, together with interest at the rate of twelve per cent per annum from the time such tax would have been due had no such claim been filed, a copy of which said bond is attached to the said complaint and made a part thereof and marked "Exhibit A" for identification.

Seventh. That thereafter on or about the 25th day of March, 1926, the Commissioner of Internal Revenue considered the said claims for abatement and rejected the same in the sum of $29,842.32, of which determination the John Barth Company was notified and payment demanded under said bond, and that the John Barth Company wholly neglected, failed, and refused to pay the sum, or any part thereof, and still neglects, fails, and refuses to pay.

Eighth. That on or about August 10th and August 27, 1926, the United States Fidelity & Guaranty Company was notified of the determination by the Commissioner of Internal Revenue in rejecting the said claims for abatement in the sum of $29,842.32, and that there was outstanding against the John Barth Company as a result of the rejection of said claims for abatement, income and profits tax in the sum of $29,842.32 and interest in the sum of $11,538.12, all of which was due under the aforementioned bond executed by the United States Fidelity & Guaranty Company as surety, and demand was made upon said dates, upon the defendant, the United States Fidelity & Guaranty Company, for the payment of said taxes

12 and interest so determined to be due, but that the United States Fidelity & Guaranty Company has failed, neglected,

and refused, and still fails, neglects, and refuses to pay said tax and interest, or any part thereof.

Ninth. That upon the filing of said complaint and the issuing of a pracipe, a summons was issued out of said court and duly served upon each of said defendants, and that on or about the 7th day of October, 1926, both of said defendants appeared by their attorneys, Lines, Spooner & Quarles, and filed a demurrer to said complaint upon the ground that it appeared upon the face of the complaint that the action was not commenced within the time limited by law as prescribed by sections 250d of the revenue acts of 1918 and 1921, and sections 277-a2, 278d, and 278e of the revenue act of 1924, and sections 277a-3, 278d, 278e, and 1106a of the revenue act of 1926.

Tenth. That on or about the 5th day of January, 1927, after due hearing and argument, the said court sustained said demurrer and entered judgment dismissing the plaintiff's complaint upon the merits.

Eleventh. That petitioner, conceiving itself aggrieved by the judgment entered on the 5th day of January, 1927, in the above-entitled proceedings, desires to have such judgment reviewed by the United States Circuit Court of Appeals for the Seventh Circuit on writ of error.

Wherefore, the annexed assignment of errors considered, your petitioner prays that a writ of error may issue and that petitioner may be allowed to bring up for review before the United States Circuit Court of Appeals for the Seventh Circuit the said judgment and decree of the said District Court sustaining the demurrer of the defendants and dismissing the suit of petitioner, and that after due hearing there be judgment reversing the decree of the said District Court and that petitioner may have such other and further relief in the premises as may be just.

L. H. BANCROFT,
Attorney for Petitioner.

[*Duly sworn to by L. H. Bancroft; jurat omitted in printing.*]

13 In United States District Court

Assignment of errors

Filed Mar. 10, 1927

The United States of America, plaintiff in this action, in connection with and as a part of its petition for a writ of error filed herein, makes the following assignment of errors which it avers were committed by the court in the rendition of the judgment against this plaintiff appearing upon the record herein, that is to say,

First. That the court erred in holding and deciding that the petition of the plaintiff did not state facts sufficient to constitute a cause of action against the defendants.

Second. The court erred in sustaining the demurrer of the defendants to the petition of the plaintiff.

Third. The court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of the defendants.

Fourth. The court erred in rendering judgment against this plaintiff, whereas judgment should have been rendered in favor of the plaintiff and against the defendant for the reason that it appears upon the face of plaintiff's petition that this was not a suit for the collection of taxes but an action for breach of a bond given in consideration of suspending the collection of the tax and that the
14 filing of a bond created a new obligation which was not effected by any limitation statute pertaining to the collection of taxes.

Wherefore, the plaintiff prays that the said judgment may be reversed.

UNITED STATES OF AMERICA,
By L. H. BANCROFT,
Assistant United States Attorney for the Eastern District of Wisconsin.

In United States District Court

Order allowing writ of error

Filed Mar. 10, 1927

On this 10th day of March, 1927, the above-named plaintiff, appearing by its attorney, L. H. Bancroft, Assistant United States Attorney for the Eastern District of Wisconsin, and filing herein and presenting to the court its petition praying for the allowance of a writ of error and assignment of errors intended to be urged by the plaintiff, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, to sent to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises:

Now, on consideration thereof, the court does allow the writ of error as prayed in the petition of the plaintiff, without bond of plaintiff, it appearing that the above-entitled cause is one in which the United States is the real party in interest in said cause, and this appear being taken by the direction of the Department of Justice of the United States of America.

L. A. GEIGER, *District Judge.*

15 IN UNITED STATES DISTRICT COURT

Writ of error

Filed March 10, 1927

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the Judge of the District Court of the United States of America, for the Eastern District of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said District Court of the United States of America, for the Eastern District of Wisconsin, before you, between United States of America, plaintiff, and the John Barth Company and United States Fidelity and Guaranty Company, defendants, a manifest error hath happened, to the great damage of the said United States of America as by the complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf. You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same at Chicago, Illinois, on the 5th day of April next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the said Supreme Court of the United States, this 10th day of March, in the year of our Lord one thousand nine hundred and twenty-seven, and of the independence of the United States the 151st.

[SEAL.] F. C. WESTPHAL, JR., *Clerk.*

[File indorsement omitted.]

16 IN UNITED STATES DISTRICT COURT

Precipe for transcript of record

Filed March 10, 1927

To F. C. WESTPHAL, JR., *clerk of said court.*

Please transmit to the Circuit Court of Appeals for the Seventh Circuit the following papers in the above entitled action, to wit:

Complaint
Precipe for summons
Summons
Demurrer

Notice of argument
Judgment sustaining demurrer
Assignment of errors
Petition for writ of error
Order allowing writ of error
Citation
Certificate of clerk.
Dated this 10th day of March, 1927.

(Signed) L. H. BANCROFT.
Asst. U. S. Attorney.

[File indorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

17 [Citation in usual form showing service on Lines, Spooner & Quarles, filed Mar. 14, 1927, omitted in printing.]

18 [Clerk's certificate to foregoing transcript omitted in printing.]

19 [Appearances of counsel omitted in printing.]

20 In United States Circuit Court of Appeals, Seventh Circuit

3885

UNITED STATES OF AMERICA vs. JOHN BARTH COMPANY ET AL.	Error to the District Court of the United States for the Eastern District of Wisconsin

Order Setting Cause

Filed Oct. 4, 1927

It is ordered by the court that this cause be, and the same is hereby, set down for hearing on Wednesday, October 12, 1927.

[Minute entry of argument and submission Oct. 12, 1927, omitted in printing.]

21 In United States Circuit Court of Appeals

[Title omitted.]

Questions certified to U. S. Supreme Court

Nov. 4, 1927

In this proceeding certain questions of law have arisen concerning which this court is in doubt and desires the advice of the Supreme Court.

The relevant facts out of which the legal questions grow are—

On May 15, 1919, the John Barth Company, one of the defendants in error, filed its income and excess profits tax return for the calendar year 1918.

On June 25, 1919, the Commissioner of Internal Revenue assessed the tax in the amount disclosed by the return in the sum of $126,182.81, of which sum said the John Barth Company paid when due $74,764.40.

On September 15, 1919, the taxpayer filed a claim in abatement with respect to the remainder of said tax in the sum of $39,501.58.

On September 20, 1919, a bond executed by the defendants in error, the John Barth Company, as principal, and the United
22 States Fidelity and Guaranty Company, as surety, was filed with the collector of internal revenue at Milwaukee, Wisconsin, said bond being as follows:

Income and profits taxes—
Bond under sections 214(a) (12) and 234(a) (14) of the revenue act of 1918

Know all men by these presents that John Barth Company of Milwaukee, Wisconsin, as principal, and United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the United States of America in the sum of sixty thousand and no 100 dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas, at the time of filing his return of income for the taxable year 1918 the above-bounden principal has filed or is about to file a claim in abatement based on the fact that he has sustained a substantial loss resulting from a material reduction (not due to temporary fluctuation) of the value of his inventory for such taxable year or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year; and

Whereas, section 214(a) (12) and 234(a) (14) of the revenue act of 1918 provide that in the case of such a claim payment of the amount of the tax covered thereby shall not be required until the claim is decided, but that the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the commissioner, conditioned for the payment of any part of such tax found to be due, with interest, and it appears that the amount of this bond is double that of the tax covered by such claim in abatement;

Now, therefore, the condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector duly pay any part of such tax found by the commissioner to be due, with interest at the rate of twelve per cent per annum from the time such tax would have been due had no such claim been filed, and shall otherwise well and truly perform and observe all the pro-
23 visions of law and the regulations, then this obligation is to be void, but otherwise to remain in full force and virtue.

Witness our hands and seals this 20th day of September, 1919.

(Signed) JOHN BARTH CO.,
By LOUIS SCHNEIDER, *Pres.*
UNITED STATES FIDELITY &
GUARANTY CO.,
By R. K. BARTON,
Agt. Atty. in Fact.

Signed, sealed and delivered in the presence of—
JULIUS ZIEGLER,
R. C. MUELLER, Jr.

(Acknowledged in Milwaukee, Wis., Sept. 20, 1919)

On March 25, 1926, the Commissioner of Internal Revenue passed upon said claim in abatement and determined that there was due from the John Barth Company on account of income and profits taxes for the year 1918, the sum of $29,842.32, of which determination by the commissioner the John Barth Company was notified and on or about April 5, 1926, the collector of internal revenue, in writing, gave notice to the John Barth Company of the amount due from it as a result of such determination and made demand of it for the payment thereof, which payment was refused. That thereafter, about August 10, 1926, the collector of internal revenue, in writing, gave notice to the defendant, the United States Fidelity and Guaranty Company, of the determination of the Commissioner of Internal Revenue in respect of said claim in abatement of the amount due from the John Barth Company as a result of such determination, and of the refusal of the John Barth Company to pay same, and demanded said payment of the United States Fidelity & Guaranty Company which payment was refused. After such refusal of payment by both the defendants in error, the United States commenced this action against them on September 22, 1926, the complaint setting out the foregoing facts.

The defendants in error (defendants in the District Court) demurred to the complaint on the ground that the action was not commenced within the time limited by law as prescribed by section
24 250(d) of the revenue acts of 1918 and 1921, respectively, sections 277(a) (2), 278(d), and 278(e) of the revenue act of 1924, and sections 278(a), 278(d), 278(e), and 1106(a) of the revenue act of 1926.

The District Court sustained the demurrer and entered judgment for the defendants. From the ruling the United States prosecutes error.

The following are the questions concerning which this court desires advice:

Question 1. Do the above mentioned sections of the statutes, upon which defendants in error rely, or any of the aforesaid sections, constitute a bar to the action of plaintiff in error?

Question 2. Was the demurrer of defendants in error to the declaration of plaintiff in error properly sustained by the District Court?

The clerk of this court is directed to transmit a certified copy hereof to the Supreme Court.

SAMUEL ALSCHULER,
EVAN A. EVANS,
GEORGE T. PAGE,
Judges of the United States Circuit Court of Appeals for the Seventh Circuit.

NOVEMBER 4, 1927.

25 In United States Circuit Court of Appeals

[Title omitted.]

Order setting cause

March 27, 1928

It is now here ordered that this cause be placed on the calendar for the April session of the October term, 1927, of this Court.

In United States Circuit Court of Appeals

[Title omitted.]

Order setting cause

April 10, 1928

It is ordered by the court that this cause be, and the same is hereby, set down for hearing on Wednesday, April 18, 1928.

[Proofs of service of briefs omitted in printing.]

26 [Appearance of counsel omitted in printing.]

27 In United States Circuit Court of Appeals

[Title omitted.]

Order setting cause

April 17, 1928

On motion of counsel for plaintiff in error, it is now here ordered that this cause be reset for hearing on May 3, 1928.

In United States Circuit Court of Appeals

Order dismissing certificate

Filed April 26, 1928

Supreme Court of the United States

No. 610. October term, 1927

THE UNITED STATES OF AMERICA

vs.

THE JOHN BARTH COMPANY AND UNITED STATES FIDELITY & Guaranty Co.

On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit

This cause came on to be heard on a certificate from the United States Circuit Court of Appeals for the Seventh Circuit and was argued by counsel.

On consolidation whereof it is now here ordered by this court that the said certificate be, and the same is hereby, dismissed.

MARCH 19, 1928.

28 A true copy.

Teste:

[SEAL.] CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of the United States.

[File indorsement omitted.]

In United States Circuit Court of Appeals

Mandate of United States Supreme Court

Filed April 27, 1928

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Seventh Circuit, greeting:

[SEAL.]

Whereas lately in the United States Circuit Court of Appeals for the Seventh Circuit, in a cause between the United States of America, plaintiff in error, and the John Barth Company and United States Fidelity & Guaranty Co., defendants in error, No. 3885, wherein certain questions arose which were certified by the said Circuit Court of Appeals to the Supreme Court of the United States for its opinion, as by the inspection of the certificate of the judges of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas in the present term of October, in the year of our Lord one thousand nine hundred and twenty-seven, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel.

On consideration whereof it is now here ordered by this court that the certificate of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, dismissed.

March 19, 1928

You, therefore, are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said certificate notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of April, in the year of our Lord one thousand nine hundred and twenty-eight.

CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of the United States.

[File indorsement omitted.]

29 [Minute entry of argument and submission, May 3, 1928, omitted in printing.]

30 In United States Circuit Court of Appeals

[Title omitted.]

Opinion filed

June 7, 1928

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

EVANS, C. J.: Plaintiff brought this action to recover $29,442.42 together with interest thereon at 1% per month from June, 1919. Liability was traced to an agreement executed by defendants whereby they agreed "to pay any part of the tax found by the commissioner to be due plaintiff from John Barth Company as income and profits tax." Defendants demurred to the complaint on the ground that the cause of action was barred by the statute of limitations because more than five years elapsed between the date of the tax return and the determination by the commissioner. The demurrer was sustained and judgment for defendants followed.

The complaint alleges that the John Barth Company, hereinafter called the taxpayer, made its 1918 income tax return to the Government and was assessed thereon a tax aggregating $126,182.81, a part of which the taxpayer promptly paid; that thereafter the taxpayer filed a claim in abatement with respect to the unpaid portion of the tax. It gave a bond pursuant to section (214a U. S.) act of

31 1918 executed by defendant, United States Fidelity and Guaranty Company.

This action is upon the bond.

Recited in the bond are the filing of the taxpayer's income tax return, its subsequent filing of a claim in abatement based upon an

asserted loss, the execution of the bond pursuant to section 214 (a) and 234 (a) of the revenue act of 1918 in order that payment of the tax be deferred until the claim in abatement be decided.

The obligation reads: "Now, therefore, the condition of the foregoing obligation is such that if the principal shall, on notice and demand by the collector, duly pay any part of such tax found by the commissioner to be due, with interest, at the rate of 12% per annum * * * then this obligation is to be void but otherwise to remain in full force and effect."

On March 25th, 1926, the Commissioner of Internal Revenue passed upon the claim in abatement and determined that there was due from the taxpayer for income and profits tax for the year in question, the sum of $29,842.42. Demand for payment was made on the taxpayer and the surety company. Payment was refused. This action was thereupon commenced.

Pertinent sections of the statutes are set forth in the margin.*

32 Plaintiff seeks to distinguish between an action to recover a tax and one based upon a surety agreement wherein the signers agreed to pay a sum represented by the tax. It admits its action to collect the tax as such has been barred by the statute of limitations. Its reliance is therefore solely upon the written obligation of defendants to pay the amount ultimately fixed by the commissioner.

In short, its position is that the taxpayer had the alternative of paying the amount assessed against it or of giving a bond to secure plaintiff while its abatement claim was pending before the commissioner. Having elected to give the bond, an additional cause of action accrued to the Government. Stated differently, the Government, upon its receipt and acceptance of the bond, became possessed of two remedies. It could enforce the collection of the tax in the manner provided by law when the amount thereof was determined, or it could sue upon the bond. Having two separate and distinct causes of action, each was subject to the application of its appropriate statute of limitations.

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* Section 250 (d) of the act of 1918:

"Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

Section 250 (d) of the act of 1921:

"The amount of income, excess-profits, or war-profits taxes due under any return made under this act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this act for prior taxable years or under prior income, excess-profits, or war-profits tax acts, or under section 38 of the act entitled "An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed unless both the commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this act or under prior income, excess-profits, or war-profits tax acts, or of any taxes due under section 38 of such act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this act."

Defendants do not dispute the creation of an additional cause of action which arose upon the execution of the surety agreement. They contend, however, that the statute, sections 250 (d), act of 1918, 250 (d), act of 1919, not only places a time limit on
33 plaintiff's remedy but section 1106 (a), act of 1926, extinguishes the liability itself.

It further insists that the greement (the basis of the second cause of action accruing to the Government) must be the sole measure of liability of those who executed it. In the instant case this agreement was merely to pay a tax, and when the tax was extinguished (not merely barred) all liability thereunder was terminated.

The courts that have passed upon this question are not in accord. Some district courts have held (decisions not reported) that the obligation of the taxpayer and the surety arising out of the execution of the agreement was to pay a sum of money which the commissioner should ultimately find due as a tax. Other courts hold that the obligation, being one to pay a tax, is as fully met by the extinguishment of the tax as by its payment by the taxpayer.

In general, it may be said that statutes of limitation bar only the remedy. But the different statutory enactments on the subject of time limitations upon the determination and assessment of income taxes culminating in the act of 1926 indicate an intent not merely to bar the remedy but to extinguish entirely all liability for the tax, where its determination and assessment is not made within five years after filing the return.

Congress evidently sought to cure, so far as possible, the evil of long delay in determining the amount of the tax with its consequent embarrassment to taxpayers and the huge penalties upon taxes determined after much delay.

Our conclusion respecting this doubtful question is that the liability under the agreement must be strictly measured by its words. Inasmuch as the parties agreed to pay "any part of such tax found by the commissioner to be due," there was no obligation to pay what had been extinguished prior to the commencement of this action.

This distinction may at first seem to be a refined one, but it is predicated upon the rule that the surety is justified in construing his contract strictly.

That the parties might have agreed to pay a sum of money rather than a tax can not be questioned. Likewise they had the option of submitting an agreement where the liability was limited to the payment of a tax. In the agreement under consideration, defendants agreed merely to pay the tax. The tax having been extinguished, the Government can not enlarge by construction of words, or
34 otherwise, the obligation of the parties.

The Government further contends that the filing of the bond was, in and of itself, a waiver or a tolling of the limitation provision of the statute. This contention would be more persuasive

were it not for the provision of the act, section 250 (d), act of 1921, which reads:

"Unless both the commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax," etc.

This express provision covering the tolling of the statute of limitation excludes the possibility of implied waivers. Expresso unius est exclusio alterius.

The judgment is affirmed.

35 In United States Circuit Court of Appeals

3885

UNITED STATES OF AMERICA vs. THE JOHN BARTH COMPANY AND United States Fidelity and Guaranty Company.	Error to the District Court of the United States for the Eastern District of Wisconsin.

Judgment

June 7, 1928

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

In United States Circuit Court of Appeals

Note re petition for rehearing

And afterwards, to wit, on the twenty-sixth day of June, 1928, there was filed in the office of the clerk of this court a petition for a rehearing, which said petition for a rehearing is not copied here.

JUNE 26, 1928. JLM—El.

Inclosure No. 257740 from Department of Justice

Section 1106 (a) of the act of 1926:

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

Section 284 (a) of the act of 1918:

"In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed."

RICHARD S. DOYLE, Esq.,
Southern Building,
Washington, D. C.

SIR: Enclosed herewith is a printed copy of the petition for rehearing which has been filed in the Circuit Court of Appeals for
36 the Seventh Circuit in the case of United States v. The John Barth Company and the United States Fidelity and Guaranty Company. Please acknowledge receipt thereof on the enclosed copy of this letter.

Respectfully,
For the Attorney General,

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

Receipt acknowledged.
RICHARD S. DOYLE,
By B. T. SIMONSON.

[Indorsed: Filed June 29, 1928. Edward M. Holloway, clerk.]

In United States Circuit Court of Appeals

Order extending time

July 6, 1928

On motion of counsel for defendant in error it is now here ordered that the time for filing answer to petition for rehearing in this cause be, and the same is hereby, extended to July 20, 1928.

In United States Circuit Court of Appeals

Note re brief in opposition to petition for rehearing

And afterwards, to wit, on the nineteenth day of July, 1928, there was filed in the office of the clerk of this court a brief in opposition to petition for rehearing, which said brief in opposition to petition for rehearing is not copied here.

37 In United States Circuit Court of Appeals

[Title omitted.]

Opinion on petition for rehearing filed

September 12, 1928

On petition for rehearing:

In support of its petition for rehearing, plaintiff in error calls our attention to section 612 of the internal revenue act of 1928 which

repeals section 1106 (a) of the revenue act of 1906 as of the date of its enactment.

The 1928 act was enacted subsequent to the oral argument and, of course, subsequent to the judgment which fixed the rights of the parties, and it was not considered by counsel or court. The argument is now made by plaintiff in error that this repeal wiped out the taxpayer's only defense. The validity of such legislation is maintained on the ground that it is a purely limitation statute, dealing only with the remedy.

In our opinion, section 1106 (a) of the revenue act of 1926 was something more than a limitation statute. It not only operated to bar the remedy but specifically extinguished the cause of action.

38 Such being the character and effect of this statute, it was not within the power of Congress to enact legislation to recreate the liability thus extinguished. William Danzer & Company, Inc., v. Gulf & Ship Island Railroad Company, 268 U. S. 633; 17 R. C. L. 674.

The petition for rehearing is denied.

39 In United States Circuit Court of Appeals

[Title omitted.]

Order denying rehearing

September 12, 1928

It is ordered by the court that the petition for a rehearing in this cause be, and the same is hereby denied.

40-41 [Clerk's certificate to foregoing transcript omitted in printing.]

42 Supreme Court of the United States

Order allowing certiorari

Filed January 7, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement:] File No. 33,835. U. S. Circuit Court of Appeals Seventh Circuit. Term No. 526. The United States of America, petitioner, vs. The John Barth Company and United States Fidelity and Guaranty Company. Petition for writ of certiorari and exhibit thereto. Filed October 30th, 1928. File No. 33,835.